

## PROFESSOR RABIN AND THE ADMINISTRATIVE STATE

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### INTRODUCTION

Being asked to contribute to this Festschrift for Bob Rabin is both a privilege and a delight. To revisit his vast and influential oeuvre is to experience anew the breadth and depth of his scholarship. It is a sumptuous banquet at which one can sample a great many delicacies and then go back to refill one's plate with one's favorite Rabinesque dishes. (Indeed, if—like me and Oscar Wilde—the one thing you cannot resist is temptation,<sup>1</sup> then you may want to return for thirds.)

Paying homage to Bob is even more gratifying, of course, because of his character. In my experience, it is uncommon for a superb scholar to also be an equally admirable human being and celebrated teacher, yet Bob exemplifies this elusive unity of excellence. Generous with his mind and time, scrupulous in his research and explication, attentive to the wishes and eccentricities of others, softened and enriched by the intimacies of family and friendships, Bob is what we should all aspire to be—a magisterial mensch.

When I agreed to participate in this Festschrift, Bob proposed that I leave his torts and compensation-systems writing to the other symposium participants and instead review his sizable body of work on the administrative and regulatory state.<sup>2</sup> Knowing what I would recover in his administrative state articles, which I had long admired, I agreed with alacrity. As expected, it has been a rewarding assignment.

Many of these administrative state articles were written in the 1970s, long before I met Bob—indeed, long before I began teaching law. My very first contact with Bob occurred when I was engaged as director of Consumers Union's Washington, D.C. office. He phoned me during his research on public interest lawyering. As I recall, he

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1. OSCAR WILDE, *LADY WINDERMERE'S FAN* (1892).

2. This is the reward I get for using his superb torts casebook—co-authored by Marc Franklin and now Michael Green—for more than thirty years, through seven of its eight editions! MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES* (8th ed. 2006).

introduced himself and his project—a study of public interest law<sup>3</sup>—and said that he would soon call me back for a lengthier interview. He did not do so, an inauspicious beginning to our friendship.<sup>4</sup> Somehow, we have managed to get beyond it. And somehow, his article, *Lawyers for Social Change*, was a great success even without my personal insights.

Rabin's article stands apart from his other administrative state writing, so I can readily treat it as a one-off stage-setter for considering his other work in this field. What makes this article different? Like all of Bob's administrative state pieces, it brims with insights about the processes of policy development, lawmaking, and implementation by agencies. But it is less preoccupied with how these processes and the associated administrative law doctrines work than it is with a particular institutional actor on the administrative-state stage: the public interest law firm.

*Lawyers for Social Change* provides an exceptionally rich introduction to this then-emerging phenomenon in several respects. First, Rabin presents the public interest law firm in its larger historical context. Beginning with an account of how the American Civil Liberties Union (ACLU) and the NAACP Legal Defense Fund (LDF) evolved, Rabin calls attention to some of their most important internal organizational characteristics, which he rightly identifies as shaping their behavioral incentives—the ways in which they seek to satisfy their “organizational maintenance” imperatives<sup>5</sup>—and hence the contours of their larger legal-reform agendas.<sup>6</sup> Among the most consequential of these characteristics are programmatic focus and coherence, and the relatively “clean” and fiscally manageable nature of constitutional test-case litigation.<sup>7</sup>

After placing the public interest law firm in historical context, Rabin situates it ideologically as well. He elaborates upon the interest-group-pluralism model that dominated political science and even popular thinking well into the 1960s, when the public interest law movement began to spread beyond the ACLU and LDF;<sup>8</sup> to some extent, that model still dominates, albeit in more sophisticated and qualified forms. The notion that liberal process norms assured politically legitimate and substantively acceptable outcomes presupposed robust par-

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3. See Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976) [hereinafter Rabin, *Lawyers for Social Change*].

4. He did, however, mention my Consumers Union Office in that article. See *id.* at 256.

5. E.g., JAMES Q. WILSON, POLITICAL ORGANIZATIONS 30 (1995).

6. See Rabin, *Lawyers for Social Change*, *supra* note 3, at 209–24.

7. See *id.* at 220–23.

8. See *id.* at 224–31.

ticipation in the policymaking process by all significantly affected interests. Beginning in the late 1960s—an era of intense dissatisfaction with political outcomes in areas as disparate as the Vietnam War, the environment, the status of minorities and women, the conditions of American cities, and much else—many commentators increasingly questioned this premise and thus the legitimacy of the traditional liberal political process itself.<sup>9</sup>

To this political critique, Rabin added an economic one. In Mancur Olson's canonical work, *The Logic of Collective Action*, the costs of organization—of communication, coalition building, resource seeking, representation, and bargaining—mean that social interests that are very widely shared but diffuse will almost inevitably lose out in the competition with interest groups that are more concentrated.<sup>10</sup> This theory condemned consumer and environmental groups, among others, to greater weakness in the political bargaining process of interest-group pluralism than the number of people who supported their goals would otherwise suggest. Indeed, this remorseless dynamic created a particularly cruel political irony: the relative weakness of these groups was caused precisely by the near-universal sympathy toward individuals with the groups' objectives. After all, these groups were defined by interests and goals that virtually all members of society shared regardless of their many other, narrower affiliations.

If, as these critiques suggested, the pluralist bargaining process was systematically incomplete, unbalanced, and—to that extent—illegitimate, then the public interest organization had a vital, legitimating, gap-filling role to perform: the social, political, and legal representation of these traditionally unrepresented or underrepresented groups. This widespread perception of the role of public interest organizations in society fueled their growing prominence and power during the decades that followed. This was the phenomenon, particularly in its law-reform mode, that Rabin found so arresting and worthy of study.

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9. The classic text on this development, discussed by Rabin, was THEODORE J. LOWI, *THE END OF LIBERALISM* (1969); see also Rabin, *Lawyers for Social Change*, *supra* note 3, at 224–25.

10. See generally MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION* (1965).

If the members of a large group rationally seek to maximize their personal welfare, they will *not* act to advance their common or group objectives unless there is coercion to force them to do so, or unless some separate incentive, distinct from the achievement of the common or group interest, is offered to the members of the group individually on the condition that they help bear the costs or burdens involved in the achievement of the group objectives.

*Id.* at 2. For a critical essay on a related book by Olson, see Peter H. Schuck, *The Politics of Economic Growth*, 2 YALE L. & POL'Y REV. 359 (1984) (reviewing MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* (1982)).

But while Rabin was beguiled by the public interest law firm as an instrument of reform, he neither romanticized it nor overlooked its inherent limitations. He observed that the broadest constituency claimed by public interest law firms—the consumer interest—was not represented in any obvious sense by most of these firms, which often advocated the interests of employees, making “the relationship to a consumer interest . . . highly tenuous.”<sup>11</sup> But representational tenuousness was not Rabin’s only objection to the grandiose claims of public interest law firms: “More generally, aesthetic sensibility, occupational safety, public health, and a host of other values bear a price tag that, assuming internalization, must be borne by ‘consumers.’”<sup>12</sup> For much the same reason, “the suggestion of a broad majoritarian or ‘societal’ interest as the underpinning for public interest law is unconvincing.”<sup>13</sup>

To these objections, he might have added others. First, consumer interests, far from being monolithic and readily discernible, are extraordinarily diverse and cannot possibly be defined, much less represented, by any single organization or even by a group of them.<sup>14</sup> The inevitable trade off between the quality and the cost of goods is itself as variable as the number, preferences, and ability to pay of consumers. Even the interest of consumers in more and better information is affected by the marginal cost and value of such information, which will vary from consumer to consumer and according to the form and complexity of the information. Second, many, if not all, consumer interests are represented *indirectly*, and often more effectively, by consumer-goods businesses in competitive, law-compliant markets. The interests of consumers in free trade, for example, are well represented by importers of goods seeking the lowest prices from their suppliers. Finally, public interest law firms often compete with one another to litigate or otherwise represent the “consumer interest,”

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11. Rabin, *Lawyers for Social Change*, *supra* note 3, at 229.

12. *Id.*

13. *Id.* at 229–30 (footnote omitted). Rabin also observes that “public interest advocates simply do not have discrete clients whose personal liberty or property is at stake,” without exploring the ethical dilemmas that this “clientless” practice may entail for public interest lawyers. *Id.* at 234. Also uncritically, he makes the important point that public interest law firms strive to avoid complex factual litigation, without exploring how this perfectly predictable concession to limited organizational resources might encourage judicial decisions—and the public policies that such decisions may shape—that are less attentive to real-world facts than sound public policy decisions should be. *Id.* at 237.

14. Rabin does discuss Ralph Nader, who I believe represents both the strengths and the weaknesses of self-styled consumer representation. *Id.* at 225. For a very early discussion of Naderism, written when I was in Nader’s employ, see Peter H. Schuck, *The Nader Chronicles*, 50 TEX. L. REV. 1455 (1972) (book review).

which suggests yet another dimension of contestability with respect to the definition of that interest.<sup>15</sup> For example, one group may demand higher levels of safety despite the resulting higher costs, while another group may emphasize the interests of lower-income consumers in trading off those values differently. This conflict can also arise when U.S. manufacturers propose to sell some of their products that do not meet the higher U.S. safety standards in developing-country markets.

The main purpose of Rabin's inquiry was not to describe the public interest law firm, but rather to explain its role in the administrative law process. Focusing on a number of now-canonical judicial decisions that expanded standing, intervention, and other public participation rights,<sup>16</sup> Rabin shows how the public interest groups that achieved these legal victories decided to organize their priorities and agendas in light of their organizational imperatives and constraints.

One of those constraints is "avoidance techniques," with which agencies hope to minimize the organizational costs and policy changes that a court order might require.<sup>17</sup> One such avoidance technique, which Rabin details in his earlier study of agency implementation of a costly change to a welfare statute, is to confine the effect of judicial decisions that the agency opposes to the particular jurisdiction in which the case arose.<sup>18</sup> Public interest law firms in turn seek to neutralize those evasions by triggering congressional oversight, closely monitoring agency implementation, bringing follow-up litigation, pressing courts to issue self-implementing orders, and other methods.<sup>19</sup> Another major obstacle to agency implementation of court-ordered reforms, not mentioned by Rabin, is the fact that the most common judicial remedy in reviewing administrative error is a remand to the relevant agency for further proceedings.<sup>20</sup> This gives the agency

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15. One example, among many, of this competition is the split over asbestos injury compensation legislation between the National Legal Policy Center, which supported the compensation legislation pending before Congress, and Ralph Nader's Public Citizen, which opposed it. JEB BARNES, *DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM* 62 (2011).

16. See, e.g., *United States v. Seeger*, 380 U.S. 163, 184–85 (1965); *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971); *Friends of the Earth v. FCC*, 449 F.2d 1164, 1168–69 (D.C. Cir. 1971); *Office of Comm'n of the United Church of Christ v. FCC*, 359 F.2d 994, 1000–02 (D.C. Cir. 1966); *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965).

17. See Rabin, *Lawyers for Social Change*, *supra* note 3, at 243.

18. See Robert L. Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration*, 118 U. PA. L. REV. 1143, 1159 (1970) [hereinafter Rabin, *Implementation of the Cost-of-Living Adjustment*].

19. See Rabin, *Lawyers for Social Change*, *supra* note 3, at 248–55.

20. See generally Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

another bite—sometimes many bites<sup>21</sup>—at the apple, occasioning much delay and the opportunity to undermine the legal principle established by the public interest law firm.

Nevertheless, there can be no question that public interest litigation has recast administrative law over the last four decades, making it far more transparent, participatory, sensitive to a wider array of interests, and—in Rabin's term—"pedagogical."<sup>22</sup> And, as Rabin notes, the mere possibility of such litigation creates an *in terrorem* effect on agencies fearful of judicial and congressional review at the instigation of the new public interest participants.<sup>23</sup> This prospect surely affects the terms of the complex, informal, protracted, multiparty bargaining process that, in turn, shapes so much of the substance of administrative policymaking.<sup>24</sup> Whether this (no longer) new administrative law produces outcomes superior to the pre-1970s kind is an issue of enormous significance to American society. Unfortunately, Rabin does not address this issue. This reluctance is perfectly understandable, for such a bottom-line assessment would beg numerous normative and empirical questions to which there are no unequivocal, uncontroversial, or readily measurable answers.

This complexity would not necessarily leave Rabin or us completely at sea in making such an assessment. Some of the costs of the new administrative law may be significant even if unquantifiable. Others may be quantifiable: longer and more complex decision processes at the agency level; more appeals to the courts and Congress; fewer clear-cut and stable policy outcomes; delay-related errors and cost increases; more uncertainty on the part of investors and firms subject to possible sanctions for noncompliance; and so on. Agencies may succeed in reducing these costs through multiple rounds of advance consultations with affected parties in the case of rulemaking, but this

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21. The classic example is the *SEC v. Chenery Corp.* line of cases. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); see also *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

22. See Rabin, *Lawyers for Social Change*, *supra* note 3, at 252–54 (describing “[p]ublic interest law . . . as an educational vehicle or as a means of establishing procedural bulwarks that have major significance in later cases”).

23. See *id.* at 253 (“Occasional cases resist easy quantification, because they force individual self-examination, mobilize organizational activity, and trigger political reaction. From a long-range perspective, such cases demonstrate again that, whatever its limitations, the judicial forum plays a creative role in the process of law reform.”).

24. See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 794 (1981) (“[A]n agency engaged in rulemaking is a political creature, which must command a minimum degree of acceptance from its constituencies. If its processes are perceived as unfair, it may encounter congressional interference brought on by disgruntled regulated interests, and its rules may be actively resisted in practice.”).

tactic too involves additional delay—and its associated costs—and is not as feasible when policies are made through adjudication.

To be sure, the benefits of more robust participation and protracted consideration of these issues might exceed the process, error, and uncertainty costs. These benefits may include improved information about the likely consequences of proposed policies; greater public confidence in agency decisions; less “capture” by regulated and other well-organized interests; and better decisions—whatever “better” means. Whether these benefits in fact exceed the costs is, of course, the \$64 billion question, and Rabin wisely does not attempt to answer it. The difficulty of doing so is suggested by the intricate feedback loops revealed by many detailed studies of administrative law cases—for example, Jerry L. Mashaw and David L. Harfst’s finding that the costs to agencies of proceeding through the more-inclusive, technocratic, participatory process of informal rulemaking sometimes cause them to make policy by instead using narrower, more opaque forms of agency policymaking, such as agency adjudication.<sup>25</sup> In a realm as complex, dynamic, multifarious, and interdependent as the administrative process, the law of unanticipated consequences operates with special force and remorselessness.

## II. ANALYSIS

In the remainder of this Article, I shall identify and then comment upon some of the principal preoccupations and substantive themes that inform Rabin’s administrative state work, themes that are of enduring interest and salience in the field. These themes are (1) the need for empiricism in administrative state scholarship; (2) the importance of informal, nonlegal aspects of the administrative process; (3) the dilemma of administrative discretion; (4) the historical evolution of the administrative state; and (5) the need to balance competing values in administration.

### A. *Empiricism*

Today, administrative state scholars often conduct empirical studies of administrative agencies, and other scholars welcome these studies, but this was not always so. It is easy to forget that when Rabin was a

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25. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 200 (1990) (“Compliance with ‘proceduralized’ judicial review for rationality, combined with the demands of executive orders from three presidents, pressed [the National Highway Traffic Safety Administration] relentlessly toward a defensive, checks-and-balances internal structure for proposing and acting on its rulemaking initiatives. The agency, as a matter of formal internal procedure, began to litigate with itself.”).

young scholar in the 1960s and 1970s, such studies were relatively uncommon. Yet early in his career, Rabin sounded the call for more detailed, fine-grained accounts of how agencies actually functioned: their formal and informal routines, organizational incentives, animating norms, and political and bureaucratic challenges.<sup>26</sup> This might seem like faint praise. After all, who would not welcome such studies?

But Rabin did not content himself with urging others to conduct such studies; he underwrote that call by researching and writing such articles himself.<sup>27</sup> For a variety of familiar reasons, empirical work is difficult to pull off.<sup>28</sup> This probably explains why, even today, relatively few administrative law professors do it and why those who do tend to focus on statistical studies about the patterns of reviewing-court decisions.<sup>29</sup> This work can be done largely at one's desk or in the library without venturing out into the field. (This is not a criticism; such studies can be very valuable.)

Rabin's field work on agencies—the Department of Veterans Administration;<sup>30</sup> the Department of Health, Education, and Welfare;<sup>31</sup> the Selective Service System;<sup>32</sup> and the Department of Justice<sup>33</sup>—was different. It was the scholarly equivalent of what journalists call shoe-leather reporting. He undertook the often-tedious, time-consuming, unglamorous, and frustrating work of poring over statutes, regulations, and other administrative guidance; visiting program offices; interviewing bureaucrats and their putative clients; examining agency

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26. See Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972) [hereinafter Rabin, *Agency Criminal Referrals*] ("It is imperative that empirical work be undertaken, exploring the process by which agency rules are made, agency adjudication is conducted, and informal agency action is taken."); Rabin, *Implementation of the Cost-of-Living Adjustment*, *supra* note 18 ("More information is needed about the pressures shaping agency policymaking and about the influence of agency policy on both coordinate policymakers and the regulated parties.").

27. E.g., Rabin, *Agency Criminal Referrals*, *supra* note 26; Rabin, *Lawyers for Social Change*, *supra* note 3.

28. See generally Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

29. E.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997). My work with E. Donald Elliott, *To the Chevron Station*, *supra* note 20, was largely statistical but also sought to follow up to determine what happened after remand in individual cases. Schuck & Elliott, *supra* note 20.

30. See generally Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975).

31. See generally Rabin, *Implementation of the Cost-of-Living Adjustment*, *supra* note 18.

32. See generally Robert L. Rabin, *Do You Believe in a Supreme Being—The Administration of the Conscientious Objector Exemption*, 1967 WIS. L. REV. 642 [hereinafter Rabin, *Do You Believe*].

33. See generally Rabin, *Agency Criminal Referrals*, *supra* note 26.



records; analyzing court rulings; parsing congressional influence on agency decisions; seeing how priorities are set and shifted, and how resources get allocated; appreciating implementation challenges; and comparing goals with actual outcomes.<sup>34</sup> Rabin's early case studies demonstrate that a lack of statistical rigor can be more than compensated by greater insights, authentic resonances, and more textured explanations.

This kind of work is uncommon even today,<sup>35</sup> but why is it valuable? The answer is quite straightforward. Detailed analysis of cases will often be the best way to identify, verify, or refute theoretical hypotheses, uncover the deep structure of an administrative organism, and understand how administrative processes actually work. This leads naturally to the next Rabinesque theme.

### B. *Informal Aspects of the Administrative Process*

Rabin recognized that he was far from the first administrative state scholar to decry the attention—obsession is not too strong a word—that casebook authors and commentators in the field pay to judicial review.<sup>36</sup> I can do no better than to quote Rabin himself on this subject:

A wide range of administrative behavior—negotiating with regulated parties, making speeches, issuing nonbinding directives, establishing enforcement priorities, hiring key personnel, developing internal channels of responsibility and many other critical kinds of decisions—is simply beyond the ambit of judicial consideration.

Furthermore, a variety of external influences on the administrative process do not leave the kind of imprint on agency decisions that would be relevant to a reviewing court. I have in mind such factors as constituency influence, congressional oversight, executive appointments and market structure. Yet all of these internal activities and external forces shape the substance and process of policy formulation in important ways. . . .

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34. For a particularly dreary example, see Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163 [hereinafter Schuck, *When the Exception Becomes the Rule*] (presenting case studies of the exceptions process in petroleum regulation to demonstrate that the process enhanced regulatory equity).

35. There are exceptions, of course, including DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* (2010) (describing the historical complexity of the Food and Drug Administration), and MASHAW & HARFST, *supra* note 25 (describing the history of the National Highway Traffic Safety Administration in order to examine “the legal and institutional armaments with which America’s domestic policy battles are waged”).

36. See Robert L. Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U. L. REV. 120, 126–27 (1977) [hereinafter Rabin, *Administrative Law in Transition*].

... [I]t is in these various low-visibility byways of the administrative system that the administrative lawyer does most of his work. . . .  
... The fact is that virtually no court of general jurisdiction, surely not the United States Supreme Court, pays much attention to these issues. For in addition to the limited range of questions amenable to review, judicial intervention is ad hoc and almost always unsystematic. Of necessity, Supreme Court review of a decision by the Forest Service or the Department of Transportation has a disembodied, abstract quality. The Court usually has only the vaguest sense of whether its decision is likely to be implemented effectively or to be of real consequence since it probably last reviewed a case from the same agency a considerable number of years earlier, and then with regard to entirely different legal questions in an entirely different factual context.<sup>37</sup>

Indeed, I would go even further than Rabin on this—though I strongly suspect that he would agree. As political scientists like James Q. Wilson have demonstrated, the nonlegal factors that most shape agencies are their self-perceived task structures (the routines and incentives required to perform the agency's specific tasks) and their organizational cultures (the agency's dominant ideology, values, and interpersonal patterns).<sup>38</sup> To cite a classic example of this case-study genre, the Forest Service can best be understood in terms of its rangers' isolation in the field, their need to accommodate themselves to the local cultures in which they must live and work, and the difficulties that this "going native" imperative creates for bureaucratic control over them.<sup>39</sup> The contrast between the Federal Bureau of Investigation (FBI) and the Drug Enforcement Agency (DEA) is another example. The FBI is characterized by its centralized control of its agents working at their desks under close supervision. The DEA is shaped by the independence required by its agents, who often operate undercover on the mean streets and in a necessarily situational, entrepreneurial fashion that is resistant to rule-based controls.<sup>40</sup> Price-control agencies, another example, are defined by the political pressures that build up when shortages inevitably develop: industry winners and losers become apparent, and exceptions must be granted.<sup>41</sup> Finally, prisons are defined in significant part by the need to maintain

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37. *Id.* at 127–28 (footnotes omitted).

38. See generally MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980). See also WILSON, *supra* note 5, at 32.

39. See generally HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (1960).

40. See generally JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* (1978).

41. See generally ROBERT A. KAGAN, *REGULATORY JUSTICE: IMPLEMENTING A WAGE-PRICE FREEZE* (1978); Schuck, *When the Exception Becomes the Rule*, *supra* note 34.

a delicate equilibrium and an economy of exchange between prisoners and guards.<sup>42</sup>

As Rabin notes in the last sentence of the excerpt quoted above, policy implementation is another bureaucratic process that administrative state scholars seldom study, theorize, or even carefully describe. Typically, it is the legal rules themselves that are of chief interest to the scholar, and the implementation of those rules is taken as a given, if not ignored entirely. Yet the reality is often quite different. In many cases, implementation is a gnarly gordian knot of unanticipated, poorly understood, and stubborn obstacles to success. To change the metaphor, it is a black box that can best be illuminated through the kind of painstaking study urged—and exemplified—by Rabin, examining individual agencies as they struggle with their limited tools to mold their resistant external environments into compliance.<sup>43</sup>

Some legal scholars have attempted to dispel this obscurity. The most revealing of these attempts are studies of structural injunctions designed to reform agency performance and legality, and the tortuous, protracted processes by which courts seek to implement them.<sup>44</sup> With remarkable regularity, these studies show the fecklessness of even the most resolute courts as they try to reshape the real-world behavior of the defendant institutions of the administrative state, not to speak of the conduct of the private citizens and civil society groups upon whom the effectiveness of the decree ultimately depends.

In thinking about the implications of these findings, consider the advantages that courts possess compared with agencies, implying that agencies are likely to face even greater implementation failures. Courts enjoy greater legitimacy and prestige among members of the public. Judicial sanctions for noncompliance, including fines and imprisonment, may be even greater than those ordinarily available to agencies, which usually can be enforced only after drawn-out proceedings in the courts and obeisances to the legislative powers-that-be. This is certainly not to deny that agencies possess their own institu-

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42. See generally GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1958).

43. See generally JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION* (3d ed. 1984) (describing how different government agencies must use results to improve the implementation and performance of government programs). See also LIPSKY, *supra* note 38, at 29–39 (describing the ways that street-level bureaucracies characteristically provide fewer resources than necessary for workers to do their jobs adequately).

44. See generally ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); PETER H. SCHUCK, *SUING GOVERNMENT* 125–98 (1983).

tional advantages for implementation relative to courts.<sup>45</sup> Rather, the point here is that to study the administrative process in its formal aspects without also paying close attention to the problems of implementation is, proverbially, to perform Hamlet without the Prince of Denmark.

### C. Administrative Discretion

Like other administrative law scholars, Rabin has been preoccupied in all of his work by the problem of agency discretion<sup>46</sup>—and with good reason. Discretion threatens a number of values cherished by liberals and conservatives alike. Democratic governance demands accountability by those who are authorized to wield official power, yet discretion can defeat, or at least attenuate, that accountability if it either exceeds legal limits or, more commonly, if it is hard to tell what those limits are.<sup>47</sup> Discretion can defeat horizontal equity by treating similar cases dissimilarly. To the extent that its exercise is opaque, discretion conceals the true grounds of decision, which may violate due process, undermine legitimate expectations regarding the content and application of rules, and impede effective review and the correction of errors.<sup>48</sup> Indeed, discretion makes it difficult to determine whether an error has in fact occurred. By loosening legal constraints and augmenting officials' power, discretion encourages arrogance and manipulation of those who depend on its fair exercise; it facilitates corruption.<sup>49</sup>

These concerns are common ground among commentators. Rabin contributes a number of case studies in which some of these problems are manifest, and he offers plausible ways, most of them familiar con-

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45. I have emphasized these advantages in my own work. See, e.g., Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73, 92–93 (2008); Peter H. Schuck, *The New Judicial Ideology of Tort Law*, in 37 NEW DIRECTIONS IN LIABILITY LAW 4, 15 (Walter Olson ed., 1988).

46. See, e.g., Rabin, *Agency Criminal Referrals*, *supra* note 26.

47. For one manifestation of the discretion problem, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

48. These dangers help explain Rabin's emphasis on "adequate explanation for adverse treatment when substantial individual interests are at stake." See Robert L. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 63 (1976) [hereinafter Rabin, *Job Security and Due Process*].

49. This is true at least as modernized American systems define corruption. See Lawrence Rosen, *Understanding Corruption*, AM. INT., Mar.–Apr. 2010, at 78, 78 ("We mean by the term the influencing of the performance of a public duty—meant to be carried out in accordance with objective, impersonal protocols—for personal ends.").

straining techniques, in which they might be remedied.<sup>50</sup> He also makes an important historical claim about the larger role of discretion in struggles over the administrative state: “[T]he post-New Deal era signalled a general shift from preoccupation with the legitimacy of agency power to concern about controlling administrative discretion.”<sup>51</sup> When Rabin made this claim in his 1986 article on the history of federal regulation, it seemed convincing, even obvious.

But in 2012, opponents of the Patient Protection and Affordable Care Act,<sup>52</sup> the greatest expansion of the administrative state since the New Deal, are mounting serious challenges to the law on the very ground that Rabin claimed had been relegated to the dustbin of administrative law history and superseded by challenges to agency discretion.<sup>53</sup> These challenges go to power of the U.S. Department of Health and Human Services under the Constitution (here, the power to require people to purchase insurance),<sup>54</sup> not its discretion. This development in no way discredits Rabin’s historical-trend claim. Instead, it suggests that in the more-than-century-old struggle over the legitimacy of agency power in our administrative state, no victory is wholly secure.

#### D. *Historical Evolution of the Administrative State*

Of Rabin’s many contributions to our understanding of the historical development of the administrative state, the most ambitious is his 1986 article, *Federal Regulation in Historical Perspective*.<sup>55</sup> The article constitutes an immense achievement, developing a succession of different models of public intervention—each responding to the perceived limitations of earlier ones—and spanning more than a century of turbulent economic, social, political, technological, and legal change.

Rabin’s magisterial account is even more impressive in one important, easily overlooked respect. Histories of the federal administrative state conventionally begin with the Interstate Commerce Act of 1887

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50. See, e.g., Rabin, *Administrative Law in Transition*, *supra* note 36, at 135–45; Rabin, *Agency Criminal Referrals*, *supra* note 26, at 1080–90; Rabin, *Do You Believe*, *supra* note 32, at 681–84; Rabin, *Job Security and Due Process*, *supra* note 48, at 84–87.

51. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1299 (1986) [hereinafter Rabin, *Federal Regulation*].

52. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

53. See, e.g., *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

54. See 26 U.S.C. § 5000A(a) (2006 & Supp. IV 2010).

55. Rabin, *Federal Regulation*, *supra* note 51.

and the conditions leading to its enactment.<sup>56</sup> Rabin does so as well. At the same time, however, he also notes some earlier, lesser known federal interventions—particularly land-grant policy and the regulation of steamboat boilers—that long predated, and arguably anticipated, the familiar later ones like the Interstate Commerce Act.<sup>57</sup> These previously obscure interventions, to which Jerry Mashaw accords additional prominence in his recent exhumation of what he calls “the lost one hundred years of federal administrative law,”<sup>58</sup> are surely becoming part of the standard administrative law histories. Rabin, twenty-five years before, identified them as part of the evolutionary story, although he did not analyze them in the rich Mashavian detail that was far, far outside the scope of his article.<sup>59</sup>

In trying to distill the essential teachings of Rabin’s historical account, several features of the work are especially interesting. First, his emphasis on technological change is an important driver of the administrative state. In the nineteenth century, it was railroads. During World War I, it was the mobilization of industrial activity. In the 1920s and 1930s, it was motor vehicles, air travel, agricultural productivity, and telecommunications. Since the 1960s, new environmental contaminants and detection methods have spawned regulation. Today—mostly since Rabin wrote *Federal Regulation*—radically new information systems have facilitated lower cost globalized commerce, intensified competition, raised new concerns about privacy and cyber-crime, and much more.

Second, Rabin associates his periodization (his seven “eras”) with evolving public values.<sup>60</sup> He contends that the public philosophies of these eras—whether the Populist, Progressive, World War I, the New Deal, post-New Deal, the Great Society, or Public Interest periods—are usually fueled by social crises that animate and shape new regulatory interventions. These powerful normative currents propel new conceptions of federal and state responsibilities; of judicial review; of the legitimate role of markets, private associations, and private causes of action; and of regulatory capacity and technique.

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56. See, e.g., Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010). A contemporaneous statute, the Pendleton Civil Service Act of 1883, ch. 27, 22 Stat. 403 (codified as amended in scattered sections of 5 U.S.C.), is also a familiar starting point.

57. See Rabin, *Federal Regulation*, *supra* note 51, at 1195–96.

58. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1256 (2006).

59. For another fine example of a detailed, book-length examination of an agency, see DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2001).

60. See generally Rabin, *Federal Regulation*, *supra* note 51.

Third, Rabin does not permit his unifying themes and his historical and analytical schema to conceal the administrative state's fundamental heterogeneity. To the contrary, he reminds us of the situational differentiation of regulatory forms and authorities, of the degrees of judicial deference that they have enjoyed over time, and of the politics in which they have always been enmeshed.

Fourth, an important kind of heterogeneity within the administrative state is the distinctions that Rabin acutely develops among (1) traditional economic regulation, which usually applies to a particular industry; (2) more recent schemes of social regulation, which apply to almost all firms in the economy; and (3) redistributive programs, which involve individuals' claims to public resources as a matter either of legal entitlement or of agency discretion. Although the antecedents of such redistributive programs can be found in the early nineteenth-century<sup>61</sup> and post-Civil War period,<sup>62</sup> they have become vastly larger and more important since the New Deal and Great Society eras.

Writing in the mid-1980s, Rabin emphasized that the main features of the federal administrative state had by then become politically legitimate and judicially enforced.<sup>63</sup> Yet even as he wrote, changing theories of economic efficiency and of "public choice" were helping to fuel reforms in specific regulatory policies.<sup>64</sup> Some of these changes were dramatic, as with the deregulation of the airline, energy, and surface-transportation sectors<sup>65</sup> and the growing interest in market-aided regulatory techniques, such as emissions trading under the 1970 Clean Air Act Amendments.<sup>66</sup>

Although Rabin was deeply attentive to the recurrent cycles of regulatory and anti-regulatory fervor in American history and political economy, even he has probably been surprised by much of what has

61. See Michele Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 394–96 (2005) (discussing federal disaster relief).

62. See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 2 (1992) (discussing post-Civil War systems of social provisions).

63. See Rabin, *Federal Regulation*, *supra* note 51, at 1302 n.397 (quoting *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971)).

64. See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1383–84 (1998).

65. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.); Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 121, 92 Stat. 3350, 3369 (codified as amended at 15 U.S.C. 3331) (eliminating price controls for certain natural-gas sales); ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered section of 49) (abolishing the Interstate Commerce Commission to reform economic regulation of transportation).

66. Rabin discussed such techniques in a short article, Robert L. Rabin, *Ozone Depletion Revisited: EPA Regulation of Chlorofluorocarbons*, REGULATION, Mar.–Apr. 1981, at 32, 36–37.

followed in the development of the administrative state. What cyclical theory would have predicted the continuous explosion in civil rights, environmental, workplace, and immigration regulation since 1985 under administrations of all ideological hues? Other than the reductive truisms that politicians always seek to satisfy powerful voter blocs and that Congress often goes its own way, what causal theory would explain the huge expansion of the Medicare entitlement that President George W. Bush promoted at a time when the country was fighting costly wars in Iraq and Afghanistan?<sup>67</sup> Or the fact that a Democratic administration helped to jettison more than sixty years of New Deal controls over the banking industry, only to see the next Democratic administration impose far more extensive controls over the financial services industry, not to mention those over the even larger health care sector?<sup>68</sup> How did these highly prescriptive interventions manage to overthrow the far more modest policing and monitoring models of regulation that, in Rabin's account, had limited the scope of the administrative state for more than a century? And on the redistributive side of state building, who would have predicted in 1985, only three years after a bipartisan fix to the Social Security financing system, that entitlement reform would be the rallying cry of many Democrats in the Congress that convened in January 2011?

One further motif of Rabin's administrative state historiography bears mention. Gazing back across more than a century of administrative development, he discerns at least one troubling constant: a lack of coherence.<sup>69</sup> In overviewing his narrative, he writes that "Congress and the courts have never fashioned a coherent theory of administrative government."<sup>70</sup> Ideology about the state's role, the design of regulatory institutions, the overall strategy of regulation, even the Supreme Court's judicial review of agency decisions all lack coherence. Exhibit A in Rabin's account of the Reagan era (the last period considered by Rabin) is the Court's inconsistent treatment of social regulation as it oscillated between resistance to politicized regulatory agencies in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual*

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67. *Bush Signs Law to Cover Drugs for the Elderly*, N.Y. TIMES, Dec. 9, 2003, at A1.

68. See Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.), *repealing* 12 U.S.C. §§ 78, 377 (sections 32 and 20, respectively, of the Banking Act of 1933).

69. Rabin allows (or so I found) only one exception to this constant: Herbert Hoover's associational model. See Rabin, *Federal Regulation*, *supra* note 51, at 1241-42.

70. *Id.* at 1194.



*Auto Insurance Co.* and broad deference to such politicization in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>71</sup>

But do these sorts of patterns demonstrate incoherence, or are they manifestations of something considerably less damning and worrisome? I take up this question in the final section of this Part.

### *E. Competing Values in Administration*

In his work on the administrative state—as well as in his tort scholarship—Rabin is a pluralist, a pragmatist, and an interest-balancer. I do not intend this as faint praise; quite the contrary. These qualities together constitute a hard-won virtue that I esteem highly and try to achieve in my own work. It is hard won because it requires the scholar to resist the always-alluring temptation to find a single beacon by which to navigate one's intellectual journey. If one's lodestar is equality, for example, then one can more readily evaluate all phenomena according to their equalizing propensities.<sup>72</sup> (I put to one side here the well-known conceptual and implementation difficulties that the notion of equality itself presents.) If instead the criterion is liberty, economic efficiency, communal solidarity, or some other value, then the same advantage applies (subject to the same difficulties). Those for whom a single value is paramount are relatively comfortable advancing bold, striking theories that seem crisp, consistent, coherent, and comprehensive—theories that others can understand and apply with relative ease. Using the well-known taxonomy applied to characterize polar cognitive and analytical styles, such people will tend to be lumpers, not splitters.<sup>73</sup>

Rabin—like me—is an inveterate splitter. He affirms the salience and legitimacy of the manifold values implicated by the administrative state, and he insists that all of them be given their due weight. Like any good splitter, he does not offer any overarching theory of what weight is due for each. Presumably, he views that as a matter for democratic politics to decide, constrained only by the Constitution and popular morality.

Nowhere is this Rabinesque orientation more evident than in his critique of Charles Reich's famous article, *The New Property*.<sup>74</sup> Ra-

71. *Id.* at 1321–25 (noting that, in the 1970s, the Court also “oscillat[ed] between a search for the Right Answer and tolerance of a Best Effort”).

72. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

73. “Some social observers are ‘lumpers’ who stress similarities among human cultures. Others are ‘splitters’ who stress differences among societies.” Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015, 1023 (2011).

74. Charles A. Reich, *The New Property*, 73 YALE. L.J. 733 (1964).

bin, although deeply committed to the protection of individual rights against the excessive intrusions of the state, rebukes Reich for elevating the rights of self-realization and life-style choice (as defined by Reich) above all other considerations.<sup>75</sup> Rabin acknowledges the "genius" of Reich's ability to "detail the singular threats to individuality posed by an interventionist state, committed ironically to unprecedented levels of public services and benefits,"<sup>76</sup> but condemns Reich's tendency "to lose sight of the countervailing considerations that make more intelligible" the limitations that the state imposes on individuality.<sup>77</sup>

"The crux of the problem," Rabin explains, "is very simply stated. Those who would exercise their individuality without constraint often would do so at the expense of others."<sup>78</sup> Social values usually conflict and thus must be weighed against one another. Like any conscientious interest-balancing splitter, Rabin seeks to identify the competing values—in the *New Property* context, he contrasts "conscientious" conduct with "conformist" conduct—without providing any general or systematic formula for reconciling them.<sup>79</sup> This is emphatically *not* to say that Rabin eschews personal judgment about how such conflicts should be addressed and even resolved. Rather, he insists that the law's solution must ultimately depend on details and context, and on some combination of—to use Reich's polarity—public participation and technocratic expertise.<sup>80</sup> Rabin's intellectual stance, then, is not antitheoretical. It is, rather, profoundly suspicious of the claim of any grand, high-level, Reichian theory to improve our thinking about the kinds of complex social problems that preoccupy the administrative state and that law and politics must resolve.

### III. CONCLUSION

This brings me, finally, to a quibble—perhaps it is more than a quibble—with Rabin's normative assessment of the American administrative state. His persistent criticism is that it lacks coherence, a complaint lodged most frequently in his magnum opus, *Federal Regulation in Historical Perspective*.<sup>81</sup> He asserts that "the everyday politics of regulatory reform has been conducted without much concern for

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75. Robert L. Rabin, *The Administrative State and Its Excesses: Reflections on The New Property*, 24 U.S.F. L. REV. 273, 277 (1990) (reviewing Reich, *supra* note 74).

76. *Id.* at 282.

77. *Id.*

78. *Id.* at 283.

79. *See id.* at 285.

80. *See id.* at 283–89.

81. *See generally* Rabin, *Federal Regulation*, *supra* note 51.

establishing a coherent theory of administrative government”;<sup>82</sup> that “Congress and the courts have never fashioned a coherent theory of administrative government”;<sup>83</sup> that the Interstate Commerce Commission “did not reflect a coherent approach to railroad regulation”;<sup>84</sup> that “Congress and the Court failed to develop a coherent policy on business consolidation and competition”;<sup>85</sup> that the Progressive Era Court failed to set “coherent boundaries on public regulation”;<sup>86</sup> that the New Deal programs failed to create a coherent governmental foundation for economic recovery;<sup>87</sup> that the courts have no coherent “theory of administrative expertise” to deal “with the technical and political dimensions of the regulatory process”;<sup>88</sup> and that the regulatory process “remains devoid of any coherent ideological framework.”<sup>89</sup>

On its face, this array of charges constitutes a very serious indictment of the administrative state. Unfortunately, Rabin never defines what he means by the word coherent (or its cognates). Accordingly, it remains unclear what the actual content of his indictment is. But almost regardless of what it means, this vaunted criterion of coherence seems to sit uneasily, perhaps even inconsistently (incoherently?), with his larger analytical style and commitment.<sup>90</sup> After all, Rabin is the consummate pluralist interest-balancer, the reflexive splitter, the scourge of comprehensive, high-level Reichian theories of the administrative state. Given his admirably pragmatic approach to the administrative state, his persistent demand that it be “coherent” is, well, incoherent—at least if he, like the *Merriam-Webster Collegiate Dictionary*, defines coherent to mean “logically or aesthetically ordered or integrated.”<sup>91</sup> In this context, moreover, such a demand is incon-

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82. *Id.* at 1194.

83. *Id.*

84. *Id.* at 1207; *see also id.* at 1215 (noting that the U.S. Supreme Court “was not about to countenance comprehensive planning by the ICC without a specific congressional directive”).

85. *Id.* at 1218; *see also id.* at 1224 (noting that the Federal Trade Commission Act and Clayton Act “failed to adopt any coherent strategy towards reconciling business growth with fair competitive practices”).

86. *Id.* at 1230.

87. Rabin, *Federal Regulation*, *supra* note 51, at 1251–52; *see also id.* at 1262–63 (noting that the New Deal recovery program lacked “a single coherent reform strategy”).

88. *Id.* at 1325; *see also id.* at 1326 (noting that the judicial system gets lower marks for intellectual coherence).

89. *Id.* at 1325.

90. In responding to an earlier draft of this Article, Rabin notes that “then and now, I meant the critique of failure to achieve coherence as a positivist (that is, descriptive) critique and assertion, not a value judgment.” Email from Robert L. Rabin to Peter H. Schuck (Jan. 10, 2011, 12:23 PST) (on file with author).

91. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 241 (11th ed. 2008).

gruous—that is, it is incompatible and inappropriate to the thing being assessed. For these reasons, it is also unintelligible (a common synonym for incoherent). To expect the administrative state to be coherent in any meaningful sense is equivalent to expecting the proverbial pig to wear lipstick.

The American administrative state is shaped by liberal democratic values and by a notoriously messy, unpredictable, pluralistic, institutionally competitive political process. The legitimacy of this process in turn depends on how well it reflects the extraordinarily complex, ethnically and normatively diverse, rapidly changing civil society that it serves. Compromise, much of it inevitably opportunistic and unprincipled, is designed into this system. Where an administrative state like ours is concerned, coherence is surely an overrated virtue, if it is a virtue at all.

After all, what overarching ordering principle or criterion could possibly render this system coherent? None, I believe, except the commitment to democracy and the rule of law—two concepts that are not only famously question begging, but that also (as our Bill of Rights affirms) systemically conflict and compete with one another. In a society like ours, coherence in any stronger sense would be the enemy of robust, American-style democratic governance.

Thoroughgoing reform of the administrative state is desirable, indeed essential, and reform proposals do and should appeal to larger principles of justice and policy. But as Rabin's exemplary work teaches us, those principles will always be multiple, conceptually ambiguous, politically contested, and compromised in their implementation. To that extent, they will be incoherent. So much the better for our democracy.